

U.S. Department of Labor

Office of Administrative Law Judges
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Date: June 2, 2000

Case No.: 1999-LHC-2010

OWCP No.: 5-102541

In the Matter of:

OTIS R. JACKSON, JR.,
Claimant,

v.

OUTSOURCE RESOURCE,
Employer.

Appearances:

Robert Macbeth, Esq.
For the Claimant

Patrick M. Mayette, Esq.
For the Employer

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("the Act"), as amended, 33 U.S.C. §§ 901 et seq.

A hearing was held in this case on January 21, 2000, in Newport News, Virginia. At the hearing, the Employer offered Exhibits EX-1¹ and EX-5, and the Claimant CX-1 through CX-9. All

¹ The following citations will be used as citations to the record:

CX - Claimant's Exhibits

EX - Employer's Exhibits

Br. - Brief

Tr. - Hearing transcript

were admitted into evidence. The Employer filed a brief, although the Claimant never did. All parties were afforded a full opportunity to present evidence and argument by submission of exhibits and briefs, as provided by law and applicable regulations. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

Several issues arose from the hearing on January 21, 2000, including whether the injury occurred on a maritime situs, whether the Claimant was engaged in maritime employment, and whether he suffered from an injury arising out of and in the course of his employment with the Employer. Because the issue of maritime situs is dispositive, I need not reach the other issues. Therefore, this Decision and Order will focus exclusively on the issue of situs.

SUMMARY OF THE EVIDENCE

The Claimant worked for Outsource Resource at two different warehouses in Norfolk, Virginia, one in the Norfolk Industrial Park and another facility on Woodlake Road. CX-9. In March 1995, the Claimant testified that his health began to deteriorate, which he attributed to the working conditions at those facilities. Tr. at 38-39. The Claimant testified that these warehouses “were not located near waterways.” *Id.* at 59. Karen Bailey, an employee of the Employer, testified that Outsource Resource does not place any employees “on or near waterways.” *Id.* at 68. In fact, the warehouses are not located within 15 miles of any navigable waterway. *Id.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In order to make a claim under the Act, a claimant must meet both the status and situs requirements of coverage. Specifically, the Act requires that the claimant be an “employee” as defined by the Act (status), and that the injury occur within a geographical area covered by the Act (situs). Section 2(3) of the Act defines status while Section 3(a)² defines situs.

Situs

In this case, the injury is alleged to have occurred at a warehouse that is over 15 miles from any navigable waterway. Tr. at 59, 68. Since the injury did not occur over the navigable waters of the United States, I must decide whether the injury occurred on “any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by any employer in

² “Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).” 33 U.S.C. § 903(a).

loading, unloading, repairing, dismantling, or building a vessel.” 33 U.S.C. § 903(a) (emphasis added).

The Fourth Circuit interpreted “other adjoining area” in Sidwell v. Express Container Servs., 71 F.3d 1134, 29 BRBS 138 (CRT) (4th Cir. 1995), cert. den., 518 U.S. 1028 (1996). In that case, the employee was injured while working at a facility eight-tenths of a mile from the employer’s shoreside terminal. 71 F.3d at 1135, 29 BRBS (CRT) at 139. The facility was

surrounded by businesses and residential developments, including a sheet metal shop, a paint contractor, a row of houses, an engraving shop, a heating and air-conditioning contractor, a gas station, a fire station, a container yard, a Nissan-owned storage area, a foundry, a wholesale meat distributor, a painting and sandblasting contractor, a railroad yard, and a large residential area across the highway.

Id. In holding that these facts precluded a finding of situs, the Fourth Circuit stated that an area “adjoins” navigable waters only if is “‘contiguous with’ or otherwise ‘touches’ such waters.” 71 F.3d at 1138-39, 29 BRBS (CRT) at 143. “If there are other areas between the navigable waters and the area in question, the latter area simply is not ‘adjoining’ the waters under any reasonable definition of that term.” 71 F.3d at 1139, 29 BRBS (CRT) at 143. An “area” is a “discrete structure or facility, the very raison d’etre of which is its use in connection with navigable waters.” Id. Furthermore, “it is inescapable that some notion of property lines will be at least relevant, if not dispositive, in determining whether the injury occurred within a single ‘other adjoining area.’” 71 F.3d at 1140, 29 BRBS (CRT) at 143. Finally, the Sidwell Court added that “it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a claimant is injured.” Id. at n.11. In Parker v. Director, OWCP, 75 F.3d 929, 933, 30 BRBS 10, 12 (CRT) (4th Cir. 1996), cert. den., 519 U.S. 812, rejected on other grounds, 519 U.S. 248 (1997), the Fourth Circuit elaborated that situs would lie “if the injury occurs within the boundaries of a marine terminal that is contiguous with navigable waters.”

The Benefits Review Board (the “Board”) applied Sidwell when it denied situs in Kerby v. Southeastern Pub. Serv. Auth., 31 BRBS 6 (1997), aff’d, 135 F.3d 770 (4th Cir. 1998) (table dec.). In Kerby, a power plant built to serve the naval shipyard, and sitting on land owned by the navy, was separated from the shipyard by a “private railroad spur” and “chain link fence.” 31 BRBS at 10. Additionally, personnel from the power plant could not move freely to the terminal without a pass. Id. at 11. The Board held that these circumstances showed that there was a “clear separation of the two parcels of land.” Id. at 10.

In two other recent cases, the Board focused on the separation of parcels of land by public streets and fences. In Griffin v. Newport News Shipbuilding and Dry Dock Co., 32 BRBS 87, 89 (1998), the Board held that because the parking lot in question “is physically separated from employer’s shipyard by a public street as well as a security fence, it must be deemed to be a separate and distinct piece of property rather than part of the overall shipyard facility.” Similarly, in McCormick v. Newport News Shipbuilding and Dry Dock Co., 32 BRBS 207, 209 (1998), the claimant was injured at a site separated from the shipyard by public roads and security fences. The Board quoted Griffin and held that “since Building 511 is a separate and distinct parcel of land, it cannot be considered an ‘adjoining area’ under Section 3(a).” Id.

From this discussion, it is clear that the Claimant was not injured on a maritime situs. In Sidwell, the Fourth Circuit denied situs to a facility only .8 miles from a waterside terminal. Here, the Claimant's alleged injury occurred over 15 miles from a navigable waterway. Clearly, many public roads and other areas separate the warehouses from any navigable waterway. As Sidwell instructs, a maritime situs must "actually 'adjoin' navigable waters, not . . . merely be in 'the general geographic proximity' of the waterfront." Sidwell, 71 F.3d at 1138, 29 BRBS (CRT) at 142. Other considerations are irrelevant.

That an employer sends some workers to the waterfront – or even that an employer has a separate site altogether that is 'adjoining' navigable water – is not germane to the question of whether an injury occurred at a covered situs. The statute is expressly limited to the place where the 'injury occurred;' an employer's other activities or locations are irrelevant to the geographic inquiry of whether the injury occurred at a covered situs.

Id. at n.8.

Perhaps realizing the inevitable outcome of this analysis, the Claimant has declined to even file a brief. Hopefully, this lackadaisical attitude reflects more a disdain for his own legal position than for this office, or the Employer in this case.

Since the Claimant was not injured on a covered situs under the Act, the claim must be denied.³

ORDER

It is hereby ORDERED that the claim for benefits is DENIED.

DANIEL A. SARNO, JR.
Administrative Law Judge

DAS/gmb

³ Because the Claimant did not prevail in this claim, the Act prohibits Claimant's counsel from receiving attorney's fees from any party. U.S. Dept. of Labor v. Triplett, 494 U.S. 715, 718 (1990) (citing with approval Director, OWCP v. Hemingway Transport, 1 BRBS 73, 75 (1974) ("The effect of Section 28 is to condition fees for claimant's attorneys on the success of a claim."); Ingalls Shipbuilding v. Director, OWCP, 991 F.2d 163, 27 BRBS 14, 16 (CRT) (5th Cir. 1993) ; Murphy v. Honeywell, Inc., 20 BRBS 68, 70 (1986) ("Attorney's fees may not be awarded for services rendered before a given tribunal unless the claim has been ``successfully prosecuted," i.e., unless additional benefits have been awarded by that tribunal or on appeal from that tribunal."); see also 33 U.S.C. § 928(e).